
United States Court of Appeals
For the Ninth Circuit

RICHARD L. DEHART and PHOEBE D. DEHART, his
wife, d/b/a DEHART OIL COMPANY, *Appellants*,

vs.

RICHFIELD OIL CORPORATION, a corporation, *Appellee*.

ON APPEAL FROM THE JUDGMENT OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

THE HONORABLE WILLIAM T. BEEKS, *Judge*

APPELLANTS' REPLY BRIEF

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<div>Richard L. DeHart and Phoebe D. DeHart, his wife, d/b/a DeHart Oil Company, <i>Appellants</i>, <i>vs.</i> Richfield Oil Corporation, a corporation,</div>	<div>No. 21597 <i>Appellee.</i></div>
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ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

THE HONORABLE WILLIAM T. BEEKS, *Judge*

APPELLANTS' REPLY BRIEF

SUPPLEMENTED STATEMENT OF THE CASE

This is an appeal to reverse an Order of Summary Judgment entered by the District Court on Appellee's (hereinafter "Richfield") motion that there were no genuine issues as to any material facts relating to the affirmative defense that Appellants' (hereinafter "the DeHarts' ") action for Breach of Contract had been released and discharged. (Tr. 320)

The "MEMORANDUM OF SETTLEMENT AGREEMENT" was executed by the attorney for the DeHarts to settle three lawsuits then pending between the parties. Those three were, a foreclosure suit

brought by Richfield, a suit on a debt brought by Richfield, and an anti-trust action brought by the DeHarts.

Richfield asserted the settlement as a defense to the anti-trust suit (Civil Action No. 5145) after the DeHarts refused to dismiss the action and execute the documents required by the settlement because their attorney has exceeded his limited authority to settle the lawsuits by not including certain items in the settlement agreement. The District Court held a separate trial to determine the validity of the "MEMORANDUM OF SETTLEMENT AGREEMENT" since a finding of validity would have resolved the anti-trust action against the DeHarts. The court was solely concerned with whether or not the anti-trust cause of action was within the terms of the settlement and whether or not the attorney for the DeHarts was authorized to settle the anti-trust action. The court found that the settlement agreement did settle the anti-trust action and that the attorney for the DeHarts was authorized to compromise the claims set forth in the anti-trust complaint. (Tr. 33, Findings of Fact and Conclusions of Law). No other factual issues were before the court.

Richfield now asserts that the finding of the court that the DeHarts had authorized their attorney to settle the anti-trust lawsuit was also a finding that he was authorized to settle any and all causes of action the DeHarts had against Richfield even though he may not have known what they were. They seek to torture the District Court's findings in the anti-trust lawsuit into a judgment holding that the attorney for the DeHarts was authorized to surrender any and all claims the DeHarts had against Richfield.

The specification of errors regarding the objections to plaintiffs' interrogatories and plaintiffs' motion for production of documents relate to the DeHarts' ability to show the existence of genuine issues of material facts. The specification of error regarding plaintiffs' jury demand is prompted by the DeHarts' desire to secure as impartial a trial as possible.

ARGUMENT

A. COLLATERAL ESTOPPEL

Appellee has correctly concurred with Appellants' position that this appeal involves the doctrine of collateral estoppel rather than the broader principles of res judicata. (Appellee's Brief p. 9-10.) Collateral estoppel works only as to material fact issues decided in the previous cases between the parties. To prove the factual issues decided in the prior lawsuit, Appellee would have this court look at the "Pre-Trial Order" which is reproduced as Appendix A of Appellee's brief. Appellee does not mention in its brief the "Findings of Facts and Conclusions of Law" entered in the prior case. Appellee does not want the court to consider the only real finding of fact entered regarding the settlement because it cannot overcome the clearly worded finding no. 3 written by the Appellee. The court in the anti-trust lawsuit, entered as finding No. 3 that:

"Plaintiffs, and each of them, instructed and authorized Dwyer to *compromise the claims set forth in the Complaint herein* [emphasis added] on the terms contained in the "Memorandum of Settlement Agreement" (Defendants Exhibit A) and to execute said agreement on Plaintiff's behalf." (Tr. 35.)

Where are the Findings of Fact necessary to support Summary Judgment in the instant case? There is no finding of fact that the attorney for the DeHarts was authorized to compromise more than the claims set forth in the Complaint. There is no finding of fact that the DeHarts authorized their attorney to surrender the breach of contract claim. There is no finding of fact that the parties contemplated a settlement which encompassed more than the settlement of the claims relevant to the three lawsuits specifically enumerated therein. There is no finding of fact that the DeHarts' attorney even knew about the breach of contract claim. The DeHarts, rather than Richfield, are entitled to the benefits of collateral estoppel. The finding that the DeHarts' attorney was only authorized to compromise the claims set forth in the anti-trust complaint should be sufficient to defeat Richfield's contention that the settlement also compromised the present cause of action.

B. RELEASE OF ALL CLAIMS

Appellee suggests that the Appellants' failure to mention the Release of All Claims is the "central flaw" in the DeHarts' appeal to secure a trial. (Appellee's Brief p. 10) The release in question was executed by the DeHarts pursuant to the judgment entered after the trial involving the authority given the DeHarts attorney to compromise the claims asserted by them in the anti-trust lawsuit. The release was but one of the documents required by the "Memorandum of Settlement Agreement" to compromise the three lawsuits. The court's judgment required the DeHarts to execute these documents, including the release, on or before December 18, 1964. Out of obedience to the court, the DeHarts did execute the release and other documents

required by the court's order rather than to have their attorney do so under the alternative mode of execution provided for in the order. The important question is whether this release executed pursuant to a settlement agreement which was agreed to by an agent with limited authority can effectively release claims which were beyond the scope of that agent's authority. In other words, the release cannot release anything more than what was within the agent's authority to compromise.

It would be a rare release which did not include broad, expansive and universal language. The difficulty with such language is that it is so often at variance with what either party to the release actually contemplates. The two sentence release which Appellee alleges to be so important actually states in the second sentence that it is intended, "as a bar to each and every claim, demand and cause of action *hereinabove specified*". [Emphasis added.] (Tr. 345) The only claim, demand or cause of action specified in the prior sentence of the release is: "Richard L. DeHart, et al., plaintiffs, v. Richfield Oil Corporation, a corporation, defendant, being action No. 5145 . . . (Tr. 344). Webster's New Collegiate Dictionary defines the word "specify" as meaning "to name or state explicitly or in detail." The release does not state an intention to release unspecified claims. It is submitted that the general language relates solely to items of damages which might have been claimed in the anti-trust cause of action and that the clearly stated intention of the release is to surrender only those claims specified.

Appellee contends that what was intended to be included within the terms of the settlement does not give rise to a fact issue. Yet even Appellee is confused over

whether the contract which is the subject of this lawsuit was intended to be included in the settlement. Its brief argues that the contract was terminated by "mutual agreement" in 1960. (Appellee's Brief p. 6) There is no evidence that either the DeHarts or Richfield contemplated that the distributorship contract was being released by the settlement.

At the time the settlement was executed, there were only four areas in which Richfield and the DeHarts were involved with each other. Three of them were subject to lawsuits at the time of the settlement and each was specified in the settlement. Those three were the mortgage foreclosures, the action on the debt, and the anti-trust action. The fourth area involved the distributorship contract. There was absolutely no reason not to specify the distributorship contract as included within the terms of the settlement or in the release. The contract represents the only area of contention between the parties which was not specified in the contract. Is it reasonably that such an important item would not have been specifically included in the settlement had the parties intended to settle it also? Is it reasonable to suppose that Richfield and the DeHarts' attorney thought they were releasing in 1964, a contract which Richfield still argues to have been terminated by mutual agreement in 1960?

For Richfield to prevail on its motion for summary judgment, the findings of fact in the anti-trust action must state (1) that the distributorship contract was within the contemplation and authority of both parties when the settlement was executed by their representative, (2) that the DeHarts' representative was authorized to release the breach of contract claim, and (3) that the breach of contract claim was within the terms

of the settlement. None of these facts has been determined upon any trial or hearing. None of these facts has been admitted by the DeHarts. None of these facts has been asserted by Richfield.

The "Pre-Trial Order", reproduced as Appendix A in Appellee's Brief, lists three disputed fact questions all concerning the authority given the DeHarts' attorney. They include, (1) a dispute over the number of mortgages to be given, (2) a dispute over the form of the debt reduction, and, most importantly, (3) a dispute over whether Richfield was to supply gasoline to the DeHarts and finance the purchase thereof by them. Is it reasonable to assume, in light of the court's finding that the DeHarts did not instruct their attorney to secure a supply of gasoline, that they authorized their agent to surrender the breach of contract claim even after being blackballed by the entire gasoline industry? Preserving either the breach of contract claim or the supply of gasoline was the only way the DeHarts had to preserve their livelihood. For Richfield, the principal objective of the settlement was to achieve a surrender by the DeHarts of their anti-trust claim. In return, the mortgages on the DeHarts' station were to be assumed by a financial institution, freeing the DeHarts from the tyranny of a mortgagee which also controlled their livelihood.

Appellee urges that the adequacy of the consideration given for the settlement has no bearing on the issues raised by this appeal. It reasons that, because the law does not permit judicial inquiry into the adequacy of the consideration for the purpose of setting aside the settlement, the consideration question is therefore entirely irrelevant. This is entirely wrong because the DeHarts are not seeking to set aside the

settlement, but rather to show that the settlement only compromised the claims set forth in the anti-trust complaint. A factual examination into the consideration given in return for the compromise of the anti-trust claims will show the unreasonableness of Appellee's claim that the breach of contract cause of action was intended to be settled. The adequacy of the consideration given is a material fact which will tend to show the intent of the parties to exclude the contract cause of action from the terms of the settlement.

C. SUMMARY JUDGMENT AND SETTLEMENTS

The history of the prior litigation shows that, before the anti-trust cause of action could be dismissed on the basis of a settlement, there had to be a trial on the factual question of the agent's authority to compromise those claims. The same settlement agreement has been asserted as a defense to the contract cause of action in this lawsuit but there has not been a factual determination that the agent was authorized to compromise the contract claims involved in this action. Under Rule 56 (c) of the Federal Rules of Civil Procedure, the moving party must show that no genuine issue as to any material fact exists. There are on record no pleadings, depositions, answers to interrogatories, admissions on file, or affidavits which show that the attorney for the DeHarts was authorized to compromise the contract cause of action. This being so, there was nothing for the DeHarts to controvert.

When a settlement which has been executed by an agent, is asserted as a defense, the party relying on it has the burden of proving both the fact of the agency of the party executing it, and his authority as agent to do so. 76 C. J. S. RELEASE, §65, p. 707. In this

case, no evidence has been presented to show the authority of the agent to release anything more than the claims set forth in the anti-trust complaint. Assuming for the purpose of argument that Richfield had shown that there was no genuine issue as to any material fact, summary judgment still was erroneous because the DeHarts either effectively controverted Richfield's evidence or have stated reasons why they could not state facts to justify their opposition as is permitted by Rule 56 (f) of the Federal Rules of Civil Procedure.

The DeHarts have controverted Richfield's assertion that no material facts exist by their answers to interrogatories directed to plaintiffs. (Tr. 173) Specifically, in Interrogatory No. 1 (Tr. 173) Richfield asked if the DeHarts contend that the release of all claims is inapplicable to the present lawsuit. The DeHarts answered under oath that they do so contend. Despite the fact that Interrogatory No. 2 (Tr. 174) calls for a legal conclusion, the court required the DeHarts to answer whether they contended that the release of all claims was "invalid or void or voidable." The DeHarts did so contend. In Interrogatory No. 3 (Tr. 174) the court required the DeHarts to list each legal ground on which they contend that the release of all claims is invalid or void or voidable. They did so. In the "Affidavit of Richard L. DeHart and Phoebe D. DeHart" (Tr. 366, 367) they reiterate their position that their attorney had limited authority to enter a settlement agreement. These statements alone, made under oath, ought to be sufficient to show that genuine issues as to material facts remain unrevolved.

More important than plaintiffs' statements under oath controverting specific facts required to be uncontroverted in order for summary judgment to be

proper, is the fact that the District Court categorically refused the DeHarts the right to discover by interrogatories the facts which would unequivocally show that genuine issues as to material facts remain unresolved. The lower court by its order entered October 18, 1966, sustained defendant's objections to plaintiffs' interrogatories and denied plaintiffs' motion for production of documents. (Tr. 318) This prevented the DeHarts from securing answers to the following interrogatories relating to the settlement which was later the basis for the summary judgment:

Interrogatory 22. "Please provide a list of the dates and times of all communications, oral or written, with either William O'Dwyer or Charles Burdell [plaintiffs' attorneys] in relation to settling the Richfield Oil Corporation disputes with the plaintiffs' herein."

Richfield's objection to this interrogatory was that the information sought is "irrelevant to any issue in the cause". (Tr. 228) As stated in their affidavit, the DeHarts expect this correspondence to show the true authority given their attorneys. (Tr. 367)

Interrogatory 35. "Is it not true that Lewis S. Armstrong [plaintiffs' attorney at the trial in Civil Action No. 5145] met with officials of Richfield Oil Corporation in California prior to the hearing November 18, 1964, before the Honorable William T. Beeks?"

Richfield's objection to this interrogatory was that it was also irrelevant to any issue. (Tr. 228)

Interrogatory 36. "If the answer to the foregoing is in the affirmative, state with whom Lewis S. Armstrong met; and, what negotiations he made with Richfield Oil Corporation on his own behalf or on behalf of the plaintiffs herein."

Again the objection was on the grounds of irrelevancy. (Tr. 228) These interrogatories all relate to the settlement agreement and the adjudication of its validity. Yet the court on October 18, 1966, agreed with Richfield that interrogatories such as No. 22 were irrelevant to any issue in this cause and then on November 23, 1966, granted summary judgment based on the settlement which was the subject of plaintiffs' interrogatories.

The same order which sustained defendant's objections to plaintiffs' interrogatories also denied plaintiffs' motion to inspect certain documents including the correspondence between the DeHarts and Richfield. (Tr. 233, Interrogatory No. 3) This too hindered appellants' ability to state controverting facts in affidavits.

Richfield in its brief has cited numerous cases where summary judgment was granted on the basis of a settlement which was not shown to be void or voidable. Not one of those cases involves the authority of an agent to execute a settlement. Not one of those cases involves the scope of the agent's authority. Not one of those cases involves a releasor claiming in a subsequent action that one or more of his claims were not relinquished by the prior release. Instead, Richfield's cases fit the factual situation of a releasor personally signing a release of the sole claim he has against the person asserting the release and subsequently claiming the release was void or voidable for one or more legally insufficient reasons. Clearly, Appellee's cases are inapplicable to the case at hand both as to law and fact.

D. APPELLANTS' JURY DEMAND

The great desire by litigants to have a jury decide their disputes should not be denied lightly. Appellants' attorney at the trial level submitted a sworn affidavit stating his reasons why the jury demand was not timely made. (Tr. 115) Appellee in its brief states that at the hearing on its motion to strike the jury demand, it "became apparent" that trial counsel's understanding was factually unfounded. (Appellee's Brief p. 18) No attempt has been made by Appellee to supplement the designated record with the transcript from that hearing. There is no evidence in the designated record that trial counsel repudiated his affidavit. If, however, the court desires to consider matters outside the designated record, it may be noted that the trial court took the position that where rule 38 of the Federal Rules of Civil Procedure is not complied with the court will strike a request under Rule 39 because it does not know what standard to apply in exercising its discretion.

CONCLUSION

Appellant respectfully submits that for the reasons advanced herein, numerous genuine issues as to material facts remain unresolved which require reversal of the order of summary judgment and an order of remand permitting discovery by Appellants and a trial on the merits, or, at the very least, a factual examination into the scope of the settlement. It is also submitted that such a trial should be before a jury.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with the rules.

Kenneth R. Long